Texaco's Motion to Dismiss stated:

> "Moreover, even if the Defendant has funded a pension plan to make payments on its behalf without the Plaintiff's agreement that such action relieves Defendant from liability for its promises, **since ERISA was enacted after the Plaintiff's employment commenced and the Defendant's fraudulent statements that induced that employment were made, ERISA cannot constitutionally have the effect of negating the Plaintiff's property rights in Defendant's promises.**"

18. Even though only common law causes of action were alleged, the U.S. District Court for the District of Utah treated the action as an ERISA claim and, without a hearing or trial or admission of any evidence, granted Texaco's Motion to Dismiss for an alleged failure to exhaust administrative remedies under an alleged ERISA plan – **without any explanation of what remedy John Karls had failed to exhaust.** After all, even though (as noted above) Texaco had not indicated prior to commencement of this action that John Karls' pension had been funded, John Karls had sent 23 inquiries to Texaco between June 30, 2003 (the date on which Texaco's June 26, 2003 letter stated wire transfers would commence) and August 21, 2003 (the date this action commenced) why no payments were ever made and Texaco's Tenth Circuit Answer Brief admits that Texaco refused to respond to any of the inquiries.

19. Texaco's Tenth Circuit November 11, 2004 Response to the Motion to Strike offers (bottom of page 1 thereof) the only "fig leaf" regarding what administrative remedy was not exhausted -- "Appellant filed a lawsuit before he allowed (Texaco) to even inform the appellant as to the

amount of appellant's retirement benefit."

20. However, as pointed out in John Karls' November 17, 2004 Reply to Texaco's Response, Texaco's alleged "fig leaf" was false because Texaco mailed its calculation of the amount of John Karls' retirement benefit "**on March 6, 2003, five and a half months before this law suit was filed**." (Citing Para. 14 of the Complaint)

21. Nevertheless, the Tenth Circuit affirmed the District Court's decision to grant Texaco's Motion to Dismiss on the grounds that some administrative remedy of Texaco's Alleged Plan had not been exhausted – even though no Alleged Plan was ever introduced into evidence, even though despite four protests John Karls was never given an opportunity to question Texaco regarding why its actions for 16 years had been inconsistent with any funding for John Karls' pension, **and even though Texaco itself has been unable to explain what administrative remedy in its Alleged Plan was not exhausted**.

22. In arguing against John Karls' assertion that he relied to his detriment by accepting employment with Texaco before 1975 on Texaco's fraudulent promise to pay a pension, one of the arguments made by Texaco (pp. 12-13 of its Answer Brief) expresses fear that other employees hired by Texaco before 1975 will also be able to prove reliance on fraudulent promises of a pension to induce acceptance of the employment offer, and asserts that the employees hired by other corporations before 1975 will also be able to prove reliance on fraudulent promises of a pension to induce acceptance of the employment offer.

THE ARGUMENTS

ARGUMENT I – PRE-1975 CAUSES OF ACTION –

EVEN IF AN ERISA PLAN IS INVOLVED, ERISA PRE-EMPTION DOES NOT APPLY RETROACTIVELY TO "ANY CAUSE OF ACTION" ARISING PRIOR TO JANUARY 1, 1975

ERISA "pre-emption" of all state law is subject to two exceptions. They are stated in 29 USC Sec. 1144(b)(1), which provides in its entirety:

> "This section (ERISA pre-emption of state law) shall not apply with respect to **any cause of action which arose**, or any action or omission which occurred, **before January 1, 1975**." (emphasis added)

The Tenth Circuit's sole consideration of the first exception for pre-1975 causes of action is contained in the following paragraph (page 3 of its opinion in the Appendix):

> "Courts applying Sec. 1144(b)(1) have agreed that a cause of action does not arise until a claim for benefits under the plan has been formally made and denied. See **Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund**, 979 F.2d 444, 450-51 (6th Cir. 1992) (citing **Rodriguez v. MEBA Pension Trust**, 872 F.2d 69 (4th Cir. 1989), which cites cases from four other circuits). Thus, Mr. Karls' cause of action clearly arose in 2003, long after ERISA became effective."

The Tenth Circuit has mis-read **Stevens**. (For an extensive discussion of **Stevens** and the cases cited therein, please see pp. 17-24 of John Karls' Opening Brief.) The **Stevens** Sixth Circuit actually said on pp. 451-2:

> "...circuits that have interpreted this section have

uniformly agreed that the two clauses of section 1144(b)(1) should be read disjunctively...Therefore, under section 1144(b)(1), if either "the cause of action arose" or relevant "acts or omissions" on which a pension fund based a post-1975 benefits decision occurred before January 1, 1975, then ERISA does not apply... **An ERISA cause of action for benefits under ERISA** does not arise until a claim for benefits has been made and formally denied. Other circuits have uniformly accepted this position. See **Rodriguez**..."

The Tenth Circuit mis-read the **Stevens** Sixth Circuit determination of when an ERISA cause of action arises as also governing when common-law causes of action arise. In this regard, it should be noted that the **Stevens** Sixth Circuit and the **Rodriguez** Fourth Circuit involved solely ERISA causes of action and were determining when ERISA causes of action arose. They were not attempting to determine when common-law causes of action arise.

When a common-law cause of action arises in the context of the ERISA pre-emption exception is a "case of first impression." However, in determining when a pre-1975 "act or omission" (the other pre-emption exception) has occurred, the **Stevens** Sixth Circuit cited two U.S. Supreme Court cases:

1. The **Stevens** court (979 F.2d 444, 452) cites **Reiter v. Sonotone Corp.**, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979) for the principle:

   "When courts interpret a statutory provision, they should give phrases joined by a disjunctive separate meanings."

2. The **Stevens** court (979 F.2d 444, 453) cites **Malone v. White Motor Corp.**, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978) in stating:

"While the Court was not directly interpreting the meaning of section 1144 in **Malone**, the opinion suggests that the Court views the ERISA statute as applying only to events occurring after January 1, 1975. (Quoting the Supreme Court) 'ERISA...provides for comprehensive federal regulation of employee pension plans, and contains a provision expressly pre-empting all state laws regulating covered plans.... Because ERISA did not become effective until January 1, 1975, ***and expressly disclaims any effect with regard to events before that date***, it does not apply to the facts of this case.'" (emphasis added to the US Supreme Court's words by the Sixth Circuit)

The ERISA pre-emption exceptions themselves recognize the same circumstances may give rise to both a state common-law cause of action and a federal-court ERISA remedy. See, for example, **Rocco v. New York State Teamsters Conference Pension and Retirement Fund**, 281 F.3d 62 (C.A.2, 2002), cert. den. 123 S.Ct. 155, 154 L.Ed.2d 29. The Second Circuit, citing at 281 F.3rd 69 the US Supreme Court in **Malone v. White Motor Corp.**, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978), held that 29 USC Sec. 1144(b)(1) provides that conduct that occurred before the effective date of ERISA is not actionable under that statute. The Second Circuit then recognized that the plaintiffs had pleaded four claims under New York common law with respect to the same wrong and were contending on appeal that the US District Court's exercise of supplemental jurisdiction over their state-law claims was "mandatory" in holding (281 F.3d 62, 72):

"(i)n light of the fact that ***no federal claims remain in this case, the district court is not required to retain jurisdiction of state law claims***.... Additionally, given the absence of ***federal claims***, remand to the

district court to exercise supplemental jurisdiction is not warranted." (citations omitted, emphasis added)

In the instant case, John Karls pleaded only state common-law claims (please see Aplt. App. Tab B which is the Utah state-court common-law Complaint for fraud). Under **Rocco**, supra, the Second Circuit would reject the contention that there is any federal jurisdiction because no federal claims were pleaded.

This is because the state common-law claim for fraud is, quoting the 29 USC Sec. 1144(b)(1) exception to ERISA pre-emption, a "cause of action which arose...before January 1, 1975." After all, Texaco made its fraudulent promises to induce John Karls, a New York City resident in 1974, to come to work for Texaco at its New York City headquarters on May 1, 1974. And the common-law rule with regard to fraud is that the tort is complete when the false promise has succeeded in inducing the desired action (though the statute of limitations may be extended with reference to the time when the fraud is discovered) -- see, for example, **Yatter v. William Morris Agency Inc.**, 268 A.D.2d 335, 702 N.Y.S.2d 243 (First Department, 2000), **Appian Estates Inc. v. Mastroddi**, 274 A.D.2d 366, 710 N.Y.S.2d 119 (Second Department, 2000), and **Nortek Inc. v. Alexander Grant & Co.**, 536 F.2d 624 (5th Cir., 1976) (applying Florida law).

In the instant case, John Karls' action for fraud against Texaco became actionable on May 1, 1974, when he resigned his previous employment in order to commence work at Texaco's New York City headquarters because of Texaco's fraudulent promise - even though John Karls would not discover Texaco's fraud for quite some time thereafter.

Accordingly, ERISA pre-emption does not apply to John Karls' action for fraud against Texaco because, under 29 USC Sec. 1144(b)(1), it is a "cause of action which arose...before January 1, 1975."

ARGUMENT II – PRE-1975 ACTS –

MOREOVER, EVEN IF AN ERISA PLAN IS INVOLVED, ERISA PRE-EMPTION DOES NOT APPLY RETROACTIVELY TO "ANY ACT" WHICH OCCURRED PRIOR TO JANUARY 1, 1975

ERISA "pre-emption" of all state law is subject to two exceptions. They are stated in 29 USC Sec. 1144(b)(1), which provides in its entirety:

> "This section (ERISA pre-emption of state law) shall not apply with respect to any cause of action which arose, **or any action or omission which occurred, before January 1, 1975**." (emphasis added)

The Tenth Circuit's sole consideration of the second exception for pre-1975 acts is contained in the following passage (page 5 of its opinion in the Appendix):

> "On appeal, Mr. Karls alludes to his claims at times as if they involved fraud in the inducement and, thus, related to the time of the induced action (his acceptance of employment with Texaco) rather than the time the fraudulent nature of the inducement came to light (when the promised benefit failed to materialize). But that is simply not what he pled. The complaint is devoid of any allegations that Texaco contemporaneously intended to renege on the pension promised at the time of his hire. Rather, the complaint focuses solely on objections to the administration of his pension claim after he requested the benefit in 2003. Thus, the factual and legal bases of this case clearly place it within the temporal reach of ERISA."

The Tenth Circuit is wrong in claiming that the "complaint is devoid of any allegations that Texaco contemporaneously intended to renege on the pension promised at the time of his hire." The first two paragraphs of

the complaint state:

> "1. Plaintiff was an employee of defendant from May 1, 1974, to December 31, 1987."
>
> "2. As part of the plaintiff's remuneration for such employment, he was promised a pension by the defendant prior to, and as an inducement of, the commencement of employment on May 1, 1974, and the plaintiff relied on that promise in commencing employment on May 1, 1974." (Par. 2 as amended on November 17, 2003, shortly after Texaco indicated for the first time ever that John Karls' pension had been funded with an ERISA plan)

The issue of "fraud in the inducement" was clearly raised in Sec 2 of the pleadings and was extensively argued in Texaco's Answer Brief. Accordingly, Texaco has not been prejudiced in any way.

First, Second, Sixth and Ninth Circuits

v.

Third, Fourth and Fifth Circuits

Accordingly, the issue which has divided seven U.S. Circuit Courts of Appeal is reached – the meaning of "any act...which occurred before January 1, 1975" in 29 USC Sec. 1144(b)(1).

One of the best summaries of these cases occurred when the Sixth Circuit considered this question in what was, for the Sixth Circuit, a "case of first impression" in **Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund**, 979 F.2d 444 (C.A.6, 1992). Kenneth Stevens was a truck driver from 1958 to 1975. No pension payments were made on behalf of Stevens for 1961-1966 even though there was no change in his status in either 1961 or 1966 and even though he was not informed that the pension payments were halted in 1961 and resumed in 1966. He brought an ERISA-

based claim in the US District Court for the Southern District of Ohio when the defendant pension fund refused to pay a pension on the grounds that he did not have the required minimum 15 years of service. In reversing the US District Court, the Sixth Circuit ruled that subject-matter jurisdiction under ERISA was barred by 29 USC Sec. 1144(b)(1).

As an initial matter, the Sixth Circuit noted (979 F.2d 444, 450) that 29 USC Sec. 1144 not only "precludes ERISA preemption from applying to 'any cause of action which arose, or any act or omission which occurred, before January 1, 1975'" but "also established the scope of ERISA jurisdiction...other courts have relied on this rationale in determining the scope of ERISA jurisdiction (citations omitted)." It should be noted in passing that all seven Circuit Courts of Appeal that have considered this issue (decisions of several of which are cited below) have agreed on this point.

Next, the **Stevens** Sixth Circuit posited (979 F.2d 444, 450) that "circuits that have interpreted this section have uniformly agreed that the two clauses of section 1144(b)(1) should be read disjunctively." Indeed, on this point the First Circuit in **Cowan v. Keystone Profit Sharing Fund**, 586 F.2d 888, 984 (C.A.1, 1978), quoted the legislative history:

> "However, it (the ERISA preemption provision) will not affect any causes of action that have arisen before January 1, 1975, and it will not affect any act or omission which occurred before that date. H.R.Conf.Rep. No. 93-1280, 93d Cong., 2d Sess., reprinted in (1974) US Code Cong. & Admin. News, pp. 5038, 5162."

Next, the **Stevens** Sixth Circuit set forth (979 F.2d 444, 451-2) two views on what constitutes a pre-1975 "act or omission" within the meaning of 29 USC Sec. 1144(b)(1) --

> "One view interprets the act or omission clause

narrowly and treats the trustees' post-ERISA denial of a pension as the act or omission that is subject to ERISA and disregards the pre-ERISA events...The Third, Fourth, and Fifth Circuits have adopted this position." (citations omitted)

"The other view interprets the act or omission clause broadly by examining the pre-ERISA events which often govern the trustees' decision.... Under this view, if the trustees' denial is based on events that occurred and plan provisions adopted before 1975, then the denial is not reviewable. The First, Second and Ninth Circuits adopt this view." (citations omitted)

Two U.S. Supreme Court decisions are cited by the **Stevens** Sixth Circuit in deciding which position is correct.

- The **Stevens** court (979 F.2d 444, 452) cites **Reiter v. Sonotone Corp.**, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979) for the principle:

  "When courts interpret a statutory provision, they should give phrases joined by a disjunctive separate meanings."

- The **Stevens** court (979 F.2d 444, 453) cites **Malone v. White Motor Corp.**, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978) in stating:

  "While the Court was not directly interpreting the meaning of section 1144 in **Malone**, the opinion suggests that the Court views the ERISA statute as applying only to events occurring after January 1, 1975. (Quoting the Supreme Court) 'ERISA...provides for comprehensive federal regulation of employee pension plans, and contains a provision expressly pre-empting all state laws regulating covered plans.... Because ERISA did not become effective until January 1, 1975, ***and***

expressly disclaims any effect with regard to events before that date, it does not apply to the facts of this case.'" (emphasis added to the US Supreme Court's words by the Sixth Circuit)

The **Stevens** Sixth Circuit concludes (979 F.2d 444, 452):

> "'Any act of omission' does not mean the most recent relevant act or omission; rather, it means any event that occurred before 1975 on which a pension fund bases a post-1975 decision. By disregarding pre-1975 events and focusing solely on the benefit denial, courts have unfortunately read the term 'any' out of section 1144(b)(1) and ignored the clear directive of the provision."

Perhaps the Sixth Circuit is being too hard on the Third, Fourth and Fifth Circuits which appear never to have entertained a case involving pre-1975 fraud or wrong-doing on the part of the employer and/or benefit plan trustees. The other four Circuit Courts did have occasion to entertain cases involving pre-1975 fraud or wrong-doing on the part of the employer and/or benefit plan trustees.

First Circuit Court of Appeals

In **Cowan v. Keystone Employee Profit Sharing Fund**, supra, the First Circuit considered a case in which plaintiff's employer had been unable to make its full contribution to a profit-sharing plan in 1970, 1971, 1972 and 1974. The employer, however, had stated that it would make "catch up" contribution for such shortfalls in subsequent years and, indeed, on November 4, 1974, the profit-sharing plan was amended to require such "catch up" payments. Plaintiff retired two weeks later, on November 19, 1974. In connection with his retirement, which included a settlement of his employee-plan benefits, plaintiff alleged that he was told that there was "no possibility" that the shortfalls would be made up and that the formal plan amendments to

accomplish that were concealed from him.

In affirming the US District Court's dismissal for lack of jurisdiction, the First Circuit held (586 F.2d 888, 895) that the plaintiff's claims were for breach-of-contract and fraud for actions of the employer:

> "Section 1144, by excluding federal jurisdiction over 'acts or omissions' occurring as well as over causes of action arising before January 1, 1975, makes it clear that the relevant date for jurisdictional purposes on these facts is 1974, not 1977."

In this regard, the First Circuit was noting "that a cause of action against a pension plan arises when one is first entitled to receive benefits from the plan" and rejecting that date (1977) as the relevant date for jurisdictional purposes.

Second Circuit Court of Appeals

In **Rocco v. New York State Teamsters Conference Pension and Retirement Fund**, 281 F.3d 62 (C.A.2, 2002), cert. den. 123 S.Ct 155, 154 L.Ed.2d 59, the Second Circuit considered a case in which the defendant wrongfully delayed the effective date of a 1973 agreement for another pension fund to merge into it, and then relied on the delayed effective date to deny plaintiffs the increased pension benefits they would have received under the terms of the merger.

The Second Circuit, citing the US Supreme Court in **Malone**, supra, held (281 F.3d, 62, 69) that 29 USC Sec. 1144(b)(1) provides that "conduct that occurred before the effective date of ERISA is not actionable under that statute."

The decision of the Second Circuit is interesting because the plaintiffs had also pleaded four claims under New York common law and they contended on appeal that US District Court's exercise of supplemental jurisdiction over their state law claims is "mandatory." On this point, the Second Circuit held (281 F.3d 62, 72):

"(i)n light of the fact that no federal claims remain in this case, the district court is not required to retain jurisdiction of state law claims.... Additionally, given the absence of federal claims, remand to the district court to exercise supplemental jurisdiction is not warranted." (citations omitted)

Sixth Circuit Court of Appeals

The decision of the Sixth Circuit in **Stevens**, supra, is discussed above.

Ninth Circuit Court of Appeals

In **Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.**, 721 F.2d 654 (C.C.9, 1983), the Ninth Circuit considered a case in which the plaintiff claimed that he had waived participation in the defendant plan because the cost had been fraudulently misrepresented. The US District Court found that the plaintiff had validly and bindingly waived his right to participate in the plan and denied his claim.

The Ninth Circuit, on its own motion since neither party had raised jurisdictional issues, held that the US District Court had lacked subject-matter jurisdiction because of the plaintiff's status as a non-participant in the plan and because ERISA cannot confer jurisdiction. In response to the plaintiff's potential argument that "the alleged fraud on him was a continuing one that was renewed each year that he was not truthfully appraised of the actual cost of his involvement in the plan" the Ninth Circuit stated (721 F.2d 654, 656) that 29 USC Sec. 1144(b)(1) means that in disputed-waiver cases "plaintiffs cannot rely on post-ERISA effects to establish ERISA claims, where the critical acts constituting and surrounding their waivers occurred before ERISA came into effect." (citations omitted)

As explained in Argument I above, the claims in

Plaintiff's complaint comprise solely state common-law claims. Even if ERISA claims and common-law claims could both have been asserted, the absence of any federal claims renders the exercise of "supplemental jurisdiction" over the common-law claims by a U.S. District Court "unwarranted." **Rocco v. New York State Teamsters Conference Pension and Retirement Fund**, supra, 281 F.3d 62, 72.

Accordingly, the U.S. Supreme Court should affirm the majority of the U.S. Circuit Courts of Appeal that an "act" within the meaning of the ERISA preemption exception is not limited to the post-1975 denial of benefits, but will also include any pre-1975 event on which the post-1975 denial is based.

In resolving this issue, the Court should keep in mind that the **Stevens** Sixth Circuit is correct that the minority view would accord no meaning or relevance to the pre-1975 "Act" ERISA pre-emption exception because, under the minority view, there would be no "act" that would not also be a pre-1975 "cause of action" – **and Congress must have had something in mind when it provided a second exception.**

CONCLUSION

For the reasons stated above, the Supreme Court should decide vis-à-vis the "Pre-1975 Cause of Action" exception to ERISA pre-emption, that the Tenth Circuit confused when an ERISA cause of action arises with when a common-law cause of action arises.

In addition, the Supreme Court should decide vis-à-vis the "Pre-1975 Act" exception to ERISA pre-emption that the panel mis-read the Complaint as amended, and that the Supreme Court should align with the majority of Circuits in

deciding that the minority is wrong to ascribe no meaning and no applicability to the "Pre-1975 Act" exception.

After all, as noted in Par 23 of the Facts, Texaco has expressed fear that other employees hired by Texaco before 1975 will also be able to prove reliance on fraudulent promises of a pension made to induce acceptance of the employment offer, and asserts that the employees hired by other corporations before 1975 will also be able to prove reliance on fraudulent promises of a pension made to induce acceptance of the employment offer.

There is no telling how many other Texaco employees have already been stopped by Texaco's sending a PIN number to an erroneous address and then having nothing further to do with them, as they did with John Karls until he commenced an earlier legal action to compel them to deal with him. And there is no telling how many other employees have already been stopped by Texaco's refusal to communicate in any way about their refusal to pay a pension, as they did with John Karls by refusing to respond to any of his 23 faxes inquiring why they were refusing to communicate before he commenced the present legal action.

Respectfully submitted this 18rd Day of August, 2005, by:

John S. Karls, Petitioner, Pro Se
PO Box 71278
Salt Lake City, UT 84171

APPENDIX

APPENDIX

FILED
United States Court of Appeals
MAY 20 2005
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN S. KARLS,
Plaintiff - Appellant,

v.

TEXACO INC.,
Defendant - Appellee.

No. 04-4110
(D.C. No. 2:03-CV-775-TS)
(D. Utah)

ORDER AND JUDGMENT

Before **SEYMOUR, McCONNELL, and TYMKOVICH,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff John S. Karls appeals the district court's dismissing this action for failure to allege exhaustion of administration remedies, as required for claims under the Employee Retirement Income Security Act (ERISA). Mr. Karls also objects to the district court's threshold ruling that

ERISA preempted the tort claims he asserted, which the district court accordingly refused to remand to state court where he originally filed them. We review these matters de novo, **Allison v. UNUM Life Ins. Co. of Am.**, 381 F.3d 1015, 1025 (10th Cir. 2004); **Kinkead v. S.W. Bell Corp. Sickness & Accident Disability Benefit Plan**, 111 F.3rd 67, 68 (8th Cir. 1997), and affirm for the reasons explained below.

The complaint alleged that Mr. Karls worked for defendant Texaco Inc. from May 1974 to December 1987 and, as part of his remuneration, he was promised a pension. In January 2003, Mr. Karls telephoned the agent administering Texaco's pension obligations to request payment of his monthly pension benefit beginning March 1, 2003. By the time Mr. Karls obtained the requisite application forms, he had been told the earliest start date he could expect was May 1. A disagreement arose subsequently over the proper amount of monthly benefit to be paid. Mr. Karls requested additional information about the expected benefit, but received no response. When he had not received any payments by the first of August, he filed suit in state court in Utah.

The complaint asserts Texaco "breached its employment contract with the plaintiff and committed fraud" by specifying a benefit start-date of May 1, 2003, rather than March 1, 2003; refusing to explain why the monthly benefit, after reduction for a "QDRO" (qualified domestic relations order), would be $495.97 rather than the $552.75 Mr. Karls thought it should be; and failing to commence monthly benefit payments by the time suit was filed. R. vol. I, doc. 1, ex. A, Complaint at 10. Texaco removed the case to federal court on the ground that it was preempted by ERISA, which provided federal question jurisdiction for removal under 28 U.S.C. Sec. 1441(b). Texaco then moved to dismiss for failure to exhaust administrative remedies, a prerequisite to

suit under ERISA. See generally **Whitehead v. Okla. Gas & Elec. Co.**, 187 F3d 1184, 1190 (10th Cir. 1999) (explaining judicially-created exhaustion doctrine in ERISA context). Mr. Karls moved to remand, arguing that his complaint did not mention a specific pension plan to which ERISA could apply, and that, in any event, he was hired and promised a pension benefit before ERISA took effect on January 1, 1975. See 29 U.S.C. § 1144(a), (b)(1). The district court denied the motion for remand and granted the motion to dismiss in a single order. This appeal followed.

Mr. Karls objects to the denial of his motion for remand for two related reasons: "Even if an ERISA plan is involved,"[1] (1) "ERISA pre-emption does not apply retroactively to 'any cause of action' arising prior to January 1, 1975"; and (2) "ERISA pre-emption does not apply retroactively to 'any act' which occurred prior to January 1, 1975." Aplt. Br. At 14, 17 (quoting 29 U.S.C. § 1144(b)(1). The district court rejected both contentions because the only relevant event that took place before January 1, 1975, i.e.,

---

[1] These objections do not deny the existence of an ERISA plan. But, with respect to the exhaustion ruling we consider later, Mr. Karls does challenge, for lacu of authentication, the particular plan attached to Texaco's motion to dismiss. Such an *evidentiary* challenge is, however, irrelevant to the *pleading* issues raised here. See **Settles v. Golden Rule Ins. Co.**, 927 F.2d 505, 508 (10th Cir. 1991) (affirming ERISA preemption ruling at pleading stage, and explaining immateriality of lack of evidence where "complaint alleged sufficient facts for the district court to determine whether it gave rise to the defense of ERISA preemption"). The issue we must decide is whether the complaint alleges an ERISA plan – i.e., sets out factual circumstances from which a benefit, beneficiary, source, and procedure can be reasonably ascertained. Mr. Karls' complaint, which alleges a monthly pension benefit to be paid to him as a former employee by Texaco's pension administrator upon submission of application forms provided to him in May 2003, suffices to set out the elements of an ERISA plan. See **Sipma v. Mass. Cas. Ins. Co.**, 256 F.3d 1006, 1012 (10th Cir. 2001). Mr. Karls cannot sidestep the legal consequences of his substantive allegations simply by avoiding explicit reference to a particular ERISA plan in his pleadings.

Mr. Karls' employment with a promise of pension benefits by Texaco in 1974, "while significant, did not give rise to the causes of action at hand. Instead, the causes of action accrued when Texaco committed its alleged frauds and breaches of contract, which the Complaint places around 2003." R. vol. I, doc. 23, at 4. We affirm that determination.

Courts applying § 1144(b)(1) have agreed that a cause of action does not arise until a claim for benefits under the plan has been formally made and denied. See **Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund**, 979 F.2d 444, 450-51 (6th Cir. 1992) (citing **Rodriguez v. MEBA Pension Trust**, 872 F.2d 69, 72 (4th Cir. 1989), which cites cases from four other circuits). Thus, Mr. Karls' cause of action clearly arose in 2003, long after ERISA became effective.

That leaves Mr. Karls' second contention, that ERISA does not apply because the case rests on predicate acts taken prior to 1975. The courts have not agreed on the proper analysis of this point: some hold that the relevant act *is* the denial of benefits, which essentially collapses the claim-accrual and predicate-act provisos of § 1144(b)(1) into a single inquiry; others hold that if the operative act underlying the cause of action occurred before the effective date, ERISA does not apply even if the cause of action accrued later. See **Stevens**, 979 F.2d at 451-52 (discussing rival views). The court has not addressed the matter in a published decision. We need not resolve the larger question here because even under the latter approach, this case falls within the preemptive scope of ERISA.

The breach of contract/fraud allegations asserted by Mr. Karls relate to the *administration* of his benefit request *in* 2003; the confusions surrounding, and ultimate postponement, of the start date he requested; Texaco's refusal to explain (through its agent administering the pension plane) why his monthly benefit was to be $495.97

instead of $552.75; and Texaco's failure to commence payment of the monthly benefit by the time suit was filed. On Appeal, Mr. Karls alludes to his claims at times as if they involved fraud in the inducement and, thus, related to the time of the induced action (his acceptance of employment with Texaco) rather than the time the fraudulent nature of the inducement came to light (when the promised benefit failed to materialize). But that is simply not what he pled. The complaint is devoid of any allegations that Texaco contemporaneously intended to renege on the pension promised at the time of his hire. Rather, the complaint focuses solely on objections to the administration of his pension claim after he requested the benefit in 2003. Thus, the factual and legal bases of this case clearly place it within the temporal reach of ERISA.

Turning to the dismissal of the action on exhaustion grounds, Mr. Karls advances two objections to the district court's disposition. First, he argues that the ERISA exhaustion requirement is inapplicable because he did not assert any ERISA claims. This argument rests primarily on the success of his position with respect to the preemption/retroactivity issue, which we have already rejected. He also appears to contend that his claims did not implicate ERISA in the first place, because he alleged fraud and breach of contract under state law, not the violation of ERISA duties. It is well-established, however, that "common law tort and breach of contract claims are preempted by ERISA if the factual basis of the cause of action involves and employee benefit plan." **Settles v. Golden Rule Ins. Co.**, 927 F.2d 505, 509 (10th Cir. 1991); see, e.g., **Milton v. Scrivner, Inc.**, 53 F3d 1118, 1121 n.3 (10th Cir. 1995) (holding claims "alleging fraud with intent to deprive plaintiff of retirement benefits . . . preempted by ERISA"); **Pacificare of Okla. Inc. v. Burrage**, 59 F3d 151, 155 (10th Cir. 1995) (holding claim "alleging negligent or fraudulent administration of [benifit] plan is preempted by ERISA").

Second, Mr. Karls argues the exhaustion ruling was predicated on unproven facts, because the only evidence of Texaco's pension plan and the remedies it afforded was the unauthenticated document referred to in footnote 1 above. As explained there, however, this evidentiary issue is beside the point in reviewing a dismissal on the pleadings – the district court held that Mr. Karls had failed even to allege exhaustion (or cure the omission following Texaco's motion to dismiss), not that exhaustion had been alleged but tested on summary judgment and affirmatively disproven. *See* R. vo. 1, doc. 23, at 5 ("Mr. Karls neither alleges in his Complaint that he did [exhaust], nor refutes the charge [of this omission] in his Opposition to the Motion to Dismiss"). Under the circumstances, the matter was properly decided on the pleadings.[2] See, e.g., **Byrd v. MacPapers, Inc.**, 961 F.2d 157, 160-61 (11th Cir. 1992); **Potter v. ICI Ams., Inc.**, 103 F.Supp.2d 1062, 1065-67 & n.2 (S.D. Ind. 1999).[3]

The judgment of the district court is **AFFIRMED**.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

NB: There was no signature

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[2] We do not wish to give the impression that Mr. Karls would have prevailed if the plan submitted by Texaco had been considered and the dismissal proceeding converted to summary judgment. On the contrary, the plan specifies a claim and review procedure that had not been completed by Mr Karls when he filed suit.

[3] We deny Mr. Karls' "Motion to Strike Copy of Alleged Retirement Plan and References Thereto" as moot. We likewise deny Mr. Karls' "Motion to Strike False Statement Regarding Payments," which refers to a statement in Texaco's brief indicating post-suit commencement of his monthly pension benefit with a lump sum payment for benefits accrued since May 2003. That statement is irrelevant to this appeal.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN S. KARLS,
Plaintiff - Appellant,

v. No. 04-4110

TEXACO INC.,
Defendant - Appellee.

ORDER

Filed June 14, 2005

Before **SEYMOUR, McCONNELL, and TYMKOVICH,** Circuit Judges.

Appellant's "Motion for Order to Extend Time to Extend Rule 40(a)(1) Time" is denied. Appellant has failed to show the "good cause" required under FRAP 26(b) for the extension.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/: Steven Larson
Deputy Clerk

Editorial Note:

The Plaintiff-Appellant had timely filed a "Motion for Order to Extend FRAP Rule 40(a)(1) Time" for 10 days on the grounds that he was abroad during the entire normal 15-day period for requesting a rehearing and he was unable to understand the Court's opinion because he was unable to

obtain the statutory text of the ERISA provisions alluded to by the Court – noting that he had no access to a U.S. law library abroad and that the web site of the U.S. Department of Labor, which administers ERISA, contained only summary descriptions that cited only ERISA section numbers and then, for statutory language, sent users to the Cornell Law School web site which required USC Title/Section numbers which bear no resemblance to the ERISA section numbers. The Motion also noted that he had tried other web sites, including the Library of Congress, all of which required USC Title/Section numbers.

Plaintiff-Appellant filed a "Petition for Rehearing" on June 13, 2005, which would have been timely if the "Motion to Extend" described above had been granted.

In rejecting the "Motion to Extend" on June 14, 2005, and consequently refusing to consider the "Petition for Rehearing," the Tenth Circuit:

- Either believed that the Plaintiff-Appellant was not entitled to understand its opinion,
- Or believed that the Plaintiff-Appellant should have made an emergency trip back to the U.S. in order to access a U.S. law library.

FILED
United States District Court
22 APRIL 2004
BY: (no signature)
DEPUTY CLERK

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JOHN S. KARLS,
Plaintiff,

v.

TEXACO INC.,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO REMAND AND GRANTING DEFENDANT'S MOTION TO DISMISS

Case No. 2:03-CV-775 TS

This matter is before the Court on Plaintiff John Karls' Motion to Remand and Defendant Texaco's Motion to Dismiss. The case, which involves a dispute about the amount and tender of pension payments Mr. Karls claims were owed to him, began in the Third District Court of Utah. It was removed to this court by Texaco based on its claim of federal subject matter jurisdiction under ERISA preemption. Mr. Karls filed an objection to that removal, followed by the present Motion to Remand. This motion is considered below, along with Texaco's Motion to Dismiss.

I. Plaintiff's Motion to Remand

The disposition of the Motion to Remand depends on two issues. First, whether Plaintiff's Complaint asserts causes of action that are preempted by ERISA; Second,

whether the effective date of ERISA excludes Mr. Karls from its purview. Each of these issues is addressed below.[1]

A. Preemption

Texaco removed the case to this court based on subject matter jurisdiction, claiming that Mr. Karls' common law claims were preempted by ERISA, and thus must be decided under that federal statute. If ERISA preempts the common law causes of action, subject matter jurisdiction would be proper in this court, because ERISA is a federal statute. ERISA explicitly preempts "any and all state laws insofar as they may now or herafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(c)(1). An employee benefit plan is

> any plan, fund, or program that was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program – (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.

29 U.S.C. § 1002(2).

Drawing on the above language of the statute, the Court inquires whether Mr. Karls' state law claims relate to an employee benefit plan. A brief review of Mr. Karls' complaint reveals that there is very little in this law suit that

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[1] The Court does not consider arguments made in Mr. Karls' "Brief Supporting Plaintiff's Removal Objection," filed January 20, 2004. The memorandum was filed with the Court almost four months after the original motion, making it untimely under DUCivR 7-1(3). Further, Mr. Karls' Objection to Removal and his Motion to Remand are, for all intents and purposes, the same motion, which means that Mr. Karls has already had plentiful opportunities to brief his position on these issues.

does not relate [to] claims involving an employee benefit plan. While the only claims Mr. Karls explicitly states are for fraud and breach of contract, it is clear that these claims are brought only in relation to the pension plan offered by his former employer, Texaco. Mr. Karls' first fraud claim states that in refusing to permit Mr. Karls to designate an early start date for payment of his pension, it committed fraud. However, Mr. Karls' assertion that Texaco was bound to allow him to designate such an early start date is based on his claim, stated in paragraph 4, that federal law permits such a designation. This paragraph is incorporated by reference into the first claim for relieve, making it clear that the claim rests squarely on federal law. Regardless, the claim is for rights under a pension plan, which qualifies under ERISA as an "employee benefit plan."

The second and third claims for relief are similar. Claim number two states that Texaco's decision to send a monthly pension payment of $495.97 rather than $522.75 is fraudulent and a breach of contract. However, it is indisputable that the discrepancy between the actual and desired payouts is governed by the employee benefit plan. The third claim alleges that Texaco's failure to pay constituted fraud. Again, the payments in dispute are payments owed under an employee benefit plan. Despite the legal stylings of his Complaint, Mr. Karls cannot escape the fact that all of the remedies he seeks are based on duties allegedly owed him by Texaco under the pension plan. Under ERISA's preemption clause, no state law may govern the disposition of such claims. ERISA preempts these claims, and therefore, this Court has subject-matter jurisdiction over Mr. Karls' Complaint.

B. Effective Date

Mr. Karls then offers the argument that because he began his employment with Texaco a full seven months before ERISA took effect, ERISA does not apply to this

case. His legal basis for this assertion rests in section (b) of ERISA's preemption clause, which states that ERISA shall not apply "with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). Mr. Karls' reading of the statute is not based on any case law of which the Court is aware. On the contrary, many decisions hold that the language in the statute excludes from ERISA only those cases where the substantial facts of the dispute, or the behavior that is the direct impetus for the cause of action, happened before 1975. See, e.g., **Estate of MacAnally v. Levin**, 10 P.3d 1197 (Colo. Ct. App. 2001); and **Lafferty v. Solar Turbines Int'l**, 666 F.2d 408 (9th Cir. 1982).

In the present case, the events that occurred prior to ERISA's effective date, while significant, did not give rise to the causes of action at hand. Instead, the causes of action accrued when Texaco committed its alleged frauds and breaches of contract, which the Complaint places around 2003. The fact that Mr. Karls entered employment with Texaco seven months before ERISA took effect cannot rescue him from having his pension plan governed by that statute, especially when 13 years (roughly 95% of the time he spent with Texaco) of his employment, the disputes over pension start dates and payments, and the alleged frauds and breaches, all took place after January 1, 1975. Thus, ERISA applies to this dispute.

In summary, because Mr. Karls' Complaint focuses on payments and start dates that he claims are owed him under a pension plan from his former employment, and the pension plan fits the definition of "employee benefit plan" supplied by ERISA, that statute applies to this case, and all state law causes of action are preempted. Further, ERISA applies here because the seven months of the employment relationship between the parties that happened before ERISA's effective date did not contain any substantial acts,

aside from the initial hiring, relevant to the current dispute, nor the events which gave rise to the causes of action. Accordingly, Mr. Karls Motion to Remand is DENIED.

II. Defendant's Motion to Dismiss

Having found that federal subject-matter jurisdiction is proper, the Court now addresses Defendant's Motion to Dismiss. To dispose of this motion, the Court need only address the question of exhaustion of administrative remedies.

The requirement that a plaintiff must exhaust administrative remedies before filing suit under ERISA is well established in the Tenth and other circuits. See **Guerrero v. Lumberman's Mut. Cas. Co.**, 174 F.Supp.2d 1218, 1221 (10th Cir. (sic) 2001); and **Held v. Manufacturers Hanover Leasing Corp.**, 912 F.2d 1197, 1206 (10th Cir. 1990); See also **Layes v. Mead Corp.**, 132 F.3d 1246, 1252 (ith Cir. 1998) and **Weiner v. D.P.M. v. Kalis and Co., Inc.**, 108 F.3d 86, 89 (6th Cir. 1997).

Not only does Texaco aver that Mr. Karls never sought to avail himself of the administrative remedies provided by its pension plan, but Mr. Karls neither alleges in his Complaint that he did so, nor refutes the charge in his Opposition to the Motion to Dismiss. Given the importance of the rule and the solidity with which it is established among the various circuits, the Court cannot allow this case to carry on with such a glaring deficiency.

For the above reasons, Texaco's Motion to Dismiss is GRANTED. All other pending motions in this case are hereby mooted.

SO ORDERED.

DATED this 22nd day of April, 2004.

BY THE COURT,

/s/: T. Stewart

TED STEWART
United States District Judge